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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

In re CLOROX CONSUMER LITIGATION This Document Relates To: ALL ACTIONS.	Master File No. 12-cv-00280-SC CLASS ACTION PLAINTIFFS' RESPONSE IN OPPOSITION TO CLOROX'S MOTION TO STRIKE NEW EVIDENCE AND ARGUMENTS SUBMITTED WITH PLAINTIFFS' REPLY BRIEF JUDGE: The Honorable Samuel Conti

I. INTRODUCTION

Plaintiffs Susan Doyle, Megan Sterritt, Lori Kowalewksi, Kristin Luszcz, Tina Butler-Furr, and Catherine Lenz ("Plaintiffs") respectfully submit this response memorandum in support of their opposition to the Motion to Strike New Evidence and Arguments Submitted with Plaintiffs' Reply Brief (Dkt. No. 116, "Motion") filed by Defendant The Clorox Company ("Clorox" or "Defendant").

In its Motion, Defendant seeks to strike portions of Plaintiffs' Reply Memorandum in Support of Their Motion for Class Certification (Dkt. No. 115, "Plaintiffs' Reply"), claiming that Defendant was "broadsided" by putative "new" evidence and arguments in Plaintiffs' Reply. However, as fully discussed below, Plaintiffs' Reply was in direct response to the arguments raised in Defendant's Opposition to Plaintiffs' Motion for Class Certification (Dkt. No. 108, "Defendant's Opposition"). Defendant's present Motion, therefore, is a mischaracterization of Plaintiffs' Reply and a baseless attempt to ignore the long-established ascertainability requirements of class certification in this Circuit. Accordingly, Defendant's Motion should be denied.

II. ARGUMENT

A. Plaintiffs' Reply Is Directly Responsive to Arguments Regarding Class Ascertainability Raised in Defendant's Opposition to Class Certification.

While courts generally do not consider new evidence presented in a reply brief without giving the non-movant party an opportunity to respond, evidence is not "new" if it is submitted in direct response to or even "within the scope of the issues raised" in an opposition to a motion. *See Wren v. RGIS Inventory Specialists*, 256 F.R.D. 180, 201 (N.D. Cal. 2009) (denying defendant's motion to strike portions of plaintiffs' reply brief and supporting declaration where they were "largely within the scope of the issues raised by [defendant's] opposition"); *Edwards v. Toys "R" Us*, 527 F. Supp. 2d 1197, 1205 n.31 (C.D. Cal. 2007) (stating that evidence is not "new . . . if it is submitted in direct response to proof adduced in opposition to a motion"); *Cook v. Champion Shipping AS*, 732 F. Supp. 2d 1029, 1031 n.2 (E.D. Cal. 2010) (denying plaintiffs' motion to strike declarations that "respond to discrete issues raised by plaintiffs in their

opposition brief, and do not raise new facts or arguments").

Here, the arguments and evidence in Plaintiffs' Reply were submitted in direct response to the issues raised in Defendant's Opposition and thus are not new or an attempt to "change gears," as Defendant purports. In its own ***nine pages*** dedicated to discussing the issue of ascertainability (Defendant's Opposition at 16-25), Defendant claims that Plaintiffs failed to adduce evidence of or methods for determining class membership, a requirement that Defendant argues is imposed by *Carrera v. Bayer Corp.*, 727 F.3d 300 (3d Cir. 2013) and *Sethavanish v. ZonePerfect Nutrition Co.*, No. 12-2907, 2014 WL 58096 (N.D. Cal. Feb. 13, 2014) (Conti, J.). However, as Plaintiffs contend in their Reply in direct response to Defendant's argument, this is not and has never been the law of the Ninth Circuit, where it is well-established that ascertainability requires only that class members can self-identify using objective criteria set out in a class definition. *See, e.g.*, *Forcellati v. Hyland's, Inc.*, No. 12–1983, 2014 WL 1410264, at *5 (C.D. Cal. Apr. 9, 2014) (stating that a class is ascertainable if it "can be defined through objective criteria" that "allows prospective plaintiffs to determine whether they are class members . . . ."); *McCrary v. Elations Co.*, No. 13–0242, 2014 WL 1779243, at *8 (C.D. Cal. Jan. 13, 2014) (holding that class was sufficiently ascertainable because "the class definition clearly define[d] the characteristics of a class member by providing a description of the allegedly offending product and the eligible dates of purchase"); *Lanovaz v. Twinings N. Am., Inc.*, No. 12–02646, 2014 WL 1652338, at *2-3 (N.D. Cal. Apr. 24, 2014) (holding that "in this Circuit, it is enough that the class definition describes a set of common characteristics sufficient to allow a prospective plaintiff to identify himself or herself as having a right to recover based on the description").

Moreover, in further direct response to Defendant's arguments regarding proof of class membership, Plaintiffs contend in their Reply that any documentary proof of class membership is simply not required at the class certification stage under Ninth Circuit jurisprudence. *See, e.g.*, *In re TFT-LCD Antitrust Litig.*, No. 07–1827, 2012 WL 253298, at *3 (N.D. Cal. Jan. 26, 2012) (noting that "ascertainability" and "proof of class membership [are] distinct concept[s]").

Indeed, this was the law of every jurisdiction until the Third Circuit issued its *Carrera* decision last year and this Court issued *ZonePerfect*.[1]

Defendant's feigned surprise that Plaintiffs addressed the ascertainability argument in response to Defendant's raising the issue is absurd. Indeed, Defendant relies heavily on both *Carrera* and *ZonePerfect* in its opposition papers in order to try to impose a burden never before required by the Ninth Circuit.[2] It should be no surprise, then, that Defendant's attempt to challenge well-settled Ninth Circuit case law necessitated the direct response found in Plaintiffs' Reply.

Although Plaintiffs continue to believe that the law in this Circuit does not mandate documentary proof of class membership at the class certification stage, in the alternative, in light of this Court's decision in *ZonePerfect*, Plaintiffs submitted a plethora of evidence from third-parties and Clorox itself demonstrating that the class is readily ascertainable at the class certification stage (Plaintiffs' Reply at 8; Dearman Decl. at ¶21). Accordingly, Plaintiffs' Reply was directly responsive to the issues raised in Defendant's Opposition, relevant to the class certification briefing, and timely given the disposition of the case law. Therefore, it should not be stricken. There is no basis for Defendant to submit a sur-reply to further brief issues that it has already exhaustively explored in its briefing to date.

III. CONCLUSION

For all of the reasons set forth above, this Court should deny Defendant's Motion in its entirety.

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[1] *See Werdebaugh v. Blue Diamond Growers*, No. 12-2724 2014 U.S. Dist. LEXIS 71575, *17-*21 (N.D. Cal. May 23, 2014) (not following the reasoning in *Carrera* and *ZonePerfect*, and holding instead that "in the Ninth Circuit '[t]here is no requirement that the identity of the class members . . . be known at the time of certification,'" and holding that "[b]ecause [the plaintiff's] proposed class is sufficiently definite to identify putative class members, the Court finds the proposed class sufficiently ascertainable.") (Koh, J.) (citations omitted).

[2] This Court's decision in *ZonePerfect* was issued the day before Plaintiffs' initial motion was filed.

DATED: May 28, 2014

/s/ Gregory S. Asciolla

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CERTIFICATE OF SERVICE

I hereby certify that on May 28, 2014, I authorized the electronic filing of the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses denoted on the Electronic Mail Notice List. I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on May 28, 2014.

/s/ Gregory S. Asciolla
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